Supreme Court, U. S.
FILED
APR 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 79-1228

WARNIE LEE IVY, ET AL,

Petitioner,

versus

SECURITY BARGE LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-1228

WARNIE LEE IVY, ET AL,
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PETITION FOR A WRIT OF CERTIORARI TO THE
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BRIEF FOR RESPONDENT IN OPPOSITION

I.
STATEMENT OF THE CASE

Suit was instituted for the death of a seaman under the Jones Act for negligence and the General Maritime Law for unseaworthiness. In answer to special inter-

rogatories, the jury found no unseaworthiness but found the Defendant guilty of Jones Act negligence which proximately contributed to the death of the seaman. The jury awarded damages including loss of society and companionship. The District Court refused to strike the damages awarded for loss of society and companionship, 424 F.Supp. 1154. The Court of Appeals for the Fifth Circuit reversed 585 F.2d 733 holding among other things that non-pecuniary damages were not recoverable under the Jones Act for death on inland waterways. On rehearing en banc the Fifth Circuit sustained its original decision 606 F.2d 524.

II.

THE ISSUE BELOW

Whether Or Not This Court's Decisions In *Moragne v. State Marine Lines, Inc.*, (1970), 398 U.S. 375, 90 S.Ct. 1972, 226 L.Ed.2d 339; *Sea-Land Services, Inc. v. Gaudet*, (1974), 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9; And *Mobil Oil Corporation v. Higginbotham*, (1978), 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581, Changed The Measure Of Damages Which May Be Recovered In A Wrongful Death Action Under The Jones Act, 46 U.S.C., Section 688, For A Death Which Occurs In Territorial Waters.

III.

RULING OF THE LOWER COURT

The United States Court of Appeals for the Fifth Circuit in an en banc decision thoroughly reviewed a seaman's wrongful death action under the Jones Act prior to *Moragne, Gaudet* and *Higginbotham*, and then carefully analyzed this Court's holding in *Moragne, Gaudet* and *Higginbotham* and rightfully concluded that the Jones Act remedy in a seaman's death in territorial waters was not affected by *Moragne, Gaudet* and *Higginbotham*. *Ivy v. Security Barge Lines, Inc.*, 5th Cir., 1979, 606 F.2d 524.

IV.

ARGUMENT

A.

Moragne, Gaudet And *Higginbotham* Did Not Change The Seaman's Jones Act Remedy

The Court began with *THE OSCEOLA*, 1903, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760, wherein this Court stated the now famous four propositions setting forth a seaman's rights against a vessel and her owner, and the Court held, among other things, that the General Maritime Law did not provide a cause of action on behalf of a seaman for negligence of his master or fellow crewmen. This Court had already decided in *THE HARRISBURG*, 1886, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358, that there was no cause of action for death under

the General Maritime Law. Congress responded to the decision in *THE OSCEOLA* by enacting the Jones Act, 46 U.S.C., Section 688, which undercut the fourth proposition of *THE OSCEOLA* and permitted a cause of action for a seaman's personal injury or death based upon negligence, fixing the standard of care as "the slightest negligence".

Damages recoverable under the Jones Act were restricted to pecuniary losses notwithstanding the silence of the Jones Act and the Federal Employers Liability Act, 45 U.S.C., Section 51, et seq, on that issue.

In 1920 Congress passed the Death On The High Seas Act, 46 U.S.C., Section 761-768, which provided recovery for death occurring on the high seas due to either negligence or unseaworthiness.

From 1920 to 1970, a seaman injured on inland waterways had cause of action under the Jones Act for negligence, and under *THE OSCEOLA* for unseaworthiness. If killed, there was no cause of action for unseaworthiness, but the remedy was limited to negligence under the Jones Act. On the other hand, a seaman injured or killed on the high seas had the same remedy as a seaman injured or killed on inland waterways, but in the event of death the recovery could be for unseaworthiness under DOHSA, but by its express terms DOHSA restricted damages to pecuniary loss.

It was this anomaly, among others, which this Court sought to remedy by its decision in *Moragne*.

Moragne was an action for wrongful death of a longshoreman which occurred on inland waterways. The issue was whether a claim for damages could be maintained for unseaworthiness under the General Maritime Law. This Court there overruled *THE HARRISBURG* and recognized for the first time that a cause of action was available for the wrongful death of a seaman under the General Maritime Law. The precise issue was whether a cause of action for wrongful death in territorial waters was maintainable due to unseaworthiness.

After the decision in *Moragne* there were three wrongful death remedies available to a seaman. A wrongful death action could be maintained for negligence only under the Jones Act where a seaman was killed in territorial waters. The sole basis of this action was the remedy provided in the Jones Act and the claim was limited to the Jones Act and could not be supplemented by state statutes. *Lindgren v. U.S.*, 1929, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 686; *Gillespie v. United States Steel Corporation*, 1964, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199.

Where death occurred on the high seas the Jones Act provided a remedy based on negligence and DOHSA provided a remedy for either negligence or unsea-

worthiness. Thus there were two wrongful death statutes covering the death of a seaman, the Jones Act and DOHSA. No cause of action existed under either statute for a seaman's death in territorial waters due to unseaworthiness, whereas the death of a seaman on the high seas was provided a remedy for unseaworthiness under DOHSA. In *Moragne* this Court judicially created a wrongful death remedy for the death of a seaman in territorial waters due to unseaworthiness and overruled *THE HARRISBURG*. The measure of damages for this *Moragne* remedy was left for development by the lower Federal Courts. In *Sea-Land Services, Inc. v. Gaudet*, 1974, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9, this Court decided the measure of damages recoverable under the remedy created in *Moragne* and held that such damages included non-pecuniary losses.

In *Mobil Oil Corporation v. Higginbotham*, 1978, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581, this Court held that the measure of damages approved in *Gaudet* for a *Moragne* remedy was restricted to territorial waters and that because the Congress had spoken directly to the measure of damages in DOHSA, the Courts were not at liberty to substitute a different measure of damages where death occurred on the high seas.

Neither *Moragne* nor *Gaudet* involved a Jones Act cause of action. Both cases dealt solely with an unseaworthiness claim asserted under the General Maritime Law. The measure of damages under the Jones Act

for the wrongful death of a seaman in territorial waters was not addressed by the Court in either case.

In this case the issue was whether the remedy provided by *Moragne* changed the Jones Act remedy as it had been applied by Federal Courts for over 60 years for the death of a seaman occurring in inland waters. The Court below concluded that it did not, because: (1) *Moragne* recognized at most a wrongful death remedy for a maritime tort and unseaworthiness; (2) the measure of damages fashioned by the Court in *Gaudet* applied solely to the *Moragne* remedy; (3) neither *Moragne* nor *Gaudet* addressed the issue of damages for wrongful death in territorial waters under the Jones Act.

In this case the Plaintiff relied on Jones Act negligence and unseaworthiness. The unseaworthiness claim was possible only because of *Moragne*. The jury rejected the unseaworthiness claim and found Jones Act negligence based upon instructions in accordance with the Jones Act and its standards. What the Plaintiff is attempting to do is to apply *Gaudet* damages, which are applicable only to a *Moragne* remedy, to a cause of action under the Jones Act.

B.

Petitioner's Brief

Petitioner lists three reasons for the granting of a writ of certiorari by this Court. The first reason stated

is "The *Higginbotham* decision does not approve the pecuniary loss rule of the *Vreeland* case". That is not the holding of the lower Court and was not a necessary finding in this case. This Court in *Higginbotham* merely held that because Congress had restricted damages in DOHSA that the Court was not at liberty to substitute a measure of damages in its place. The Court neither approved nor disapproved of *Vreeland*. In this case the lower Court was not called upon to approve the pecuniary loss rule of *Vreeland*, but merely had to decide whether or not the *Gaudet* measure of damages approved for a *Moragne* remedy changed the measure of damages long recognized for a Jones Act remedy.

The Petitioner also states that "The *Vreeland* rule cannot withstand analysis under the standards set out in *Moragne*". That may be true but was not an issue in this case. The sole issue here and in the lower Court was whether or not the measure of damages approved in *Gaudet* for a *Moragne* remedy changed the measure of damages for a wrongful death in territorial waters under the Jones Act which had been applied consistently by all Federal Courts for over 60 years.

Finally, Petitioner contends the writ should be granted because "The Court of Appeals incorrectly require an unseaworthiness finding to sustain a claim under General Maritime Law".

Prior to *Moragne* a cause of action for the wrongful death of a seaman, due to negligence, was provided for

under the Jones Act. No remedy was available where the death occurred on inland waters due to unseaworthiness. *Moragne* judicially created a remedy for that situation. *Moragne* did not replace the Jones Act nor did it create a remedy for negligence. Such a remedy already existed for the seaman under the Jones Act. Petitioner is here contending that *Moragne* not only provided a remedy for wrongful death of a seaman on inland waters due to unseaworthiness, but also a remedy for negligence. Any other construction of *Moragne*, according to Petitioner, would result is disuniformity of remedies for seamen and non-seamen. The lower Court rejected this contention and correctly so. *Ivy v. Security Barge Lines, Inc., supra.*

V.

CONCLUSION

This case involves nothing more than the correct application of this Court's decision in *Moragne, Gaudet* and *Higginbotham*. There are no conflicts among the Circuits regarding the interpretation of these cases. It is respectfully submitted that the lower Court, after thoroughly considering the above recent decisions of this Court, correctly concluded that neither applies in anyway nor affects in anyway the wrongful death remedy of a seaman in territorial waters under the Jones Act. The issue of whether or not the measure of damages for such a remedy uniformily and consistently applied by all Federal Courts for over 60 years should be changed was not an issue in this case.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I, PHILIP MANSOUR, attorney of record for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served three true copies of the foregoing Brief In Opposition To Petition For Writ of Certiorari in the above case by mailing same to counsel of record for Petitioner, Marvin L. Jeffers, Esquire, 251 Florida, Suite 400, Baton Rouge, Louisiana, 70801. I further certify that all parties required to be served have been served.

This ____ day of April, 1980.

PHILIP MANSOUR